No. 3520

IN THE

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAINIER BREWING COMPANY, a corporation,
Plaintiff in Error,

vs.

GREAT NORTHERN PACIFIC STEAMSHIP COMPANY, a corporation,
Defendant in Error.

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

Brief for Plaintiff in Error

S. J. WETTRICK,
Arctic Building,
Seattle, Washington,
Attorney for Plaintiff in Error

CHARLES A. HART and
CAREY & KERR,
Yeon Building,
Portland, Oregon,
Attorneys for Defendant in Error

PRESS OF PLINY L. ALLEN CO., SEATTLE

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STATEMENT OF THE CASE.

This case was previously before this Court on writ of error by the Steamship Company to review the judgment of the court below sustaining the motion of the Brewing Company for judgment on the pleadings and dismissal of the action. The decision reversing and remanding the case is reported in 255 Fed. 762.

Upon remand the case was submitted for decision by the District Court upon agreed facts (Tr. pp. 13-17) which for the convenience of the Court are here set forth.

STIPULATION OF FACTS

I.

The plaintiff is a corporation organized under the laws of the State of Oregon, engaged at the time stated below in the transportation of property as a common carrier by water between San Francisco, California, and Flavel, Oregon. During said times through arrangements with Spokane, Portland and Seattle Railway Company and Northern Pacific Railway Company, under the interstate commerce laws of the United States, plaintiff accepted property at San Francisco for transportation via its water line and via said rail lines to Seattle, Washington.

II.

The defendant is a corporation organized and existing under the laws of the State of Washington.

In May, 1917, defendant Brewing Company delivered to plaintiff at San Francisco, two carloads of beer for transportation over the route mentioned to Seattle, where they were to be delivered to the American Transfer Company, which was the consignee named in the bills of lading. Said shipments were accepted by the Steamship Company and shipped from San Francisco as two carload shipments, bills of lading issued accordingly and freight charges prepaid on the basis of the carload rates in the sum of $425.57.

III.

Said shipments so made by defendant consisted of numerous cases or packages of bottled beer, each of which bore a permit as required by the laws of the State of Washington, and each of which was marked in such a manner as fully to comply with the laws of the State of Washington and also the laws of the United States relating to the interstate transportation of intoxicating liquor. Each package in said shipment contained no more than the amount of beer authorized under the laws of the State of Washington to be transported under such a permit. The American Transfer Company, consignee of said shipments, was a corporation operating vehicles for the drayage and transportation of goods in and about the City of Seattle, and the shipments were consigned to it for the purpose of enabling it to distribute the different packages making up said shipments to the individuals whose names appeared on the permits.

IV.

Plaintiff Steamship Company transported the two shipments of beer on one of its steamers to Flavel, at which place they were transferred to freight cars for transportation over the Spokane, Portland and Seattle Railway to Portland, Oregon, where the shipments were to be delivered to the Northern Pacific Railway Company for transportation to Seattle. At and prior to the time of the shipment Spokane, Portland and Seattle Railway Company was operating a special freight service in connection with the steamship line of the plaintiff Steamship

Company, and less than carload shipments were commonly loaded into merchandise cars at Flavel and handled in bulk until arrival at Portland or at some other point at which distribution could be begun. Defendant's two shipments were placed in merchandise cars of this kind for transportation to Portland, at which place they were to be delivered to the Northern Pacific Company for transportation to destination. Thereafter and prior to the delivery of said shipments to the Northern Pacific Railway Company at Portland, the latter company refused to accept said shipments as carload shipments, being of the opinion that under the laws of the State of Washington, the beer could not be transported into Washington in carload lots, and said Spokane, Portland and Seattle Company being also of the opinion that the shipments could not be so transported into Washington as carload shipments, rebilled the two carload shipments at Portland and segregated them into individual less than carload shipments, each package constituting one shipment, and delivered the shipments in that manner to the Northern Pacific Railway Company, which company transported the same under said rebilling to Seattle where delivery of the individual packages was made to the persons whose names appeared on the permits attached thereto, or upon their order. No claims for any additional charges were made upon the different individuals when the packages were delivered.

V.

One of the cars contained 1,109 packages, weighing 60,891 pounds, and the other 1,456 packages,

weighing 79,798 pounds, the weight of each car exceeding the carload minimum named in the tariff. The rates application to the shipments were on file with the Interstate Commerce Commission and were combination rates based upon Portland. The through carload rate from San Francisco to Portland was 15c per 100 lbs., and from Portland to Seattle 15c, making the combination carload rate 30c per 100 lbs., which is the rate paid on said shipments.

The through less-than-carload rate from San Francisco to Portland was 25c per 100 lbs., with a minimum of 50c on a single shipment, and from Portland to Seattle 23c with a minimum of 25c for a single shipment. If the said shipments could not lawfully have been transported into the State of Washington as carload shipments and delivery made to the Transfer Company and plaintiff is entitled to charge the less-than-carload rates for the entire transportation of said shipments, the total charges due plaintiff and its connecting carriers are $1,927.27 and plaintiff is entitled to recover the difference between that sum and the charges based on the carload rates of $425.57 paid at the time of delivery to plaintiff, or the sum of $1,501.70.

VI.

Prior to the making of said shipments plaintiff had entered into an agreement with its connecting carriers by rail hereinabove named, by which it agreed to advance and pursuant to which it did advance to said connecting carriers by rail their respective charges for the portion of the transpor-

tation furnished by each of them respectively, and by which each of said companies authorized plaintiff to collect from defendant the regular tariff charge for the entire transportation from San Francisco, California, to Seattle, Washington.

The Steamship Company's claim for judgment upon this statement of facts is based upon the contention that under the laws of the State of Washington the shipments in question, which were received and billed as carload shipments and the carload rates prepaid, could not lawfully have been transported into that State in carload lots and delivered to the American Transfer Company; that the carriers therefore had to treat each package as a separate shipment; and that they are therefore entitled to charge less-than-carload rates.

The court below, basing its decision upon the decision of this Court on the former review, sustained this contention and granted judgment to the Steamship Company for the difference between the charges prepaid upon the basis of the carload rates and the charges based upon the less-than-carload rates, amounting to $1501.70.

ASSIGNMENT OF ERROR.

The Brewing Company assigns that the Court erred in holding that upon the foregoing facts the Steamship Company is entitled to judgment and in failing to enter judgment of dismissal of this action.

ARGUMENT.

In view of the complete statement of facts which is now in the record, we respectfully invite the attention of the Court to the applicable provisions of the Washington prohibition law found in Remington's 1915 Codes and Statutes.

Section 6262-15, after providing for the issuance of permits for shipments of liquor by County Auditors and the form of such permits, continues as follows (italics ours):

> "*This permit* shall be attached to and plainly affixed in a conspicuous place to any package or parcel containing intoxicating liquor, transported or shipped within the state of Washington, and when so affixed, *shall authorize* any railroad company, express company, transportation company, common carrier, or *any person, firm or corporation operating any* boat, launch or *vehicle for the transportation of goods,* wares and merchandise within the state of Washington, to transport, ship or carry not to exceed one-half gallon of intoxicating liquor other than beer, or twelve quarts or twenty-four pints of beer. Any person so transporting such intoxicating liquor shall, before the delivery of such package or parcel of intoxicating liquor, cancel said permit and so deface the same that it cannot be used again. It shall be unlawful for any person to ship, carry or transport any intoxicating liquor within the state

without having attached thereto or to the package or parcel containing the same, such permit, or to transport or ship under said permit an amount in excess of the amount or quantity hereinbefore limited."

Section 6262-18 reads as follows:

"It shall be unlawful for any express company, railroad company or transportation company, or any person, engaged in the business of transporting goods, wares and merchandise, to knowingly transport or convey any intoxicating liquor within this state, without having a permit issued by the county auditor for the transportation of such intoxicating liquor affixed in a conspicuous place to the parcel or package containing the liquor, or to deliver such liquor without defacing or canceling such permit so that the same cannot be used again. It shall be unlawful for any person to knowingly receive from any railroad company, express company, transportation company or any person engaged in the business of transporting goods, wares and merchandise any intoxicating liquor without said intoxicating liquor having a permit issued by the county auditor for such shipment attached thereto and properly canceled."

It is expressly admitted by the stipulation that each one of the packages which made up the shipments in question was marked in such a manner as fully to comply with the laws of the State of Washington and of the United States relating to the interstate transportation of intoxicating liquor. It

will therefore not be necessary to quote the provisions of the statute upon this point.

What, then, is there in the provisions of the statutes above set forth which made it unlawful to deliver the carload shipments of beer to the American Transfer Company?

The opinion of this Court upon the facts admitted by the pleadings on the former review does not indicate what considerations led it to the conclusion that the shipments could not lawfully be delivered to the American Transfer Company. The Court simply held that it would be unlawful by reason of the prohibitive provisions of the statutes of the State of Washington without stating which particular provisions of the law prohibit such delivery and why.

We can see nothing in the statutes which prohibits such delivery and we can think of no reason for the conclusion which the Court reached unless it be that it did not clearly appear that the individual packages were marked as required by law and that the American Transfer Company is a corporation operating vehicles for the transportation of goods. In the present record it is expressly stipulated that these were the facts.

The statute expressly includes among those authorized to transport intoxicating liquor, a person, firm or corporation operating a vehicle for the transportation of goods. The American Transfer

Company, therefore, had as much right and authority to transport the shipments in question as the other carriers. The shipments were consigned to it for the purpose of distributing the different packages to the individuals whose names appeared on the permits. It constituted a link in the transportation from San Francisco to the purchasers' residence. There would be just as much reason for holding that the Steamship Company could not deliver the carload lots to the railroads as there is for holding that the railroads could not make such delivery to the Transfer Company.

The statute does not confine the right of transportation to railroads and steamships and it makes no distinction between those expressly authorized by the law to transport such packages. All that the rail carriers were required to do in this instance was to deliver the carloads to the American Transfer Company, whereupon their liability would have ceased and it would have been the duty of the latter to deface the permits before delivering the packages to the permitees or purchasers. The law specifically says that any person transporting such intoxicating liquor (which includes a person operating a vehicle for hire), shall, before the delivery of the packages, cancel the permits and deface the same so that they cannot be used again. This means before the delivery to the purchaser or permitee and it is therefore the duty of the last agency authorized by

law to transport such shipments to perform these acts. Since the law expressly recognized the American Transfer Company as an authorized transportation agency there was no more reason why the rail carrier should have defaced the permits upon delivery to the Transfer Company than there would have been for the Steamship Company to insist that it had to deface them before delivering to the railroad company.

Some contention is made that Section 240 of the Federal Code has a bearing upon this case. It provides a penalty for a person to ship packages containing intoxicating liquor in interstate commerce without labeling them so as to show the name of the consignee. It is now stipulated that the packages were marked so as to conform with this section. But aside from this, it has absolutely no bearing upon the question of transportation of packages, whether singly or in the aggregate, much less upon the question whether carload or less-than-carload rates shall be charged. It is a criminal statute and a prohibition upon acts of the shipper and not of the carrier. In case of a violation, the shipper is fined, not by being required to pay higher freight rates, but by the imposition of the penalty provided. To violate this section is an offense against the Government, and the mistake of regarding it as having any bearing upon the question here involved is manifest when it is pointed out that if it would have

been violated by delivering the carloads in question to the consignee named in the bill of lading, it was equally violated by making delivery in any other manner whatsoever. What, then, has this to do with the question of whether or not carload or less-than-carload rates shall be paid?

Notwithstanding these considerations, the Court in its decision on the former review quotes this section and refers to a case in which the same was construed as supporting its conclusion.

U. S. vs. 87 Barrels, etc., of wine, 180 Fed. 215.

In that case, as in the present case, numerous barrels and kegs were shipped in several carloads from San Francisco to Vermont in order to take advantage of carload rates. The individual packages were intended for numerous persons at the point of destination, but each car was consigned to one person or company as consignee. The question was whether under Section 240, which requires that the package be so labeled on the outside cover as to plainly show the name of the consignee, the person or company to whom they were consigned was the consignee within the meaning of the statute, or the purchasers for whom they were ultimately intended and to whom they were to be delivered at destination. The Court held that "consignee" as used in the statute means the person or corporation "to whom the carrier may lawfully make delivery

of the consigned goods *in accordance with its contract of carriage,"* and that delivery of the shipments in bulk to the person named in the bill of lading was therefore legal.

In its opinion on the former review this Court applied the foregoing quotation as if the word "lawfully" had reference to the statute laws instead of the laws governing the rights and duties of carriers under the contract of carriage. This is clearly wrong, as is indicated by the words in italics above and by reference to the opinion of the Court and to the syllabus which reads in part as follows:

> "Held that the term 'consignee' was so used in its primary legal sense to describe the person to whom the liquor was to be delivered at destination in accordance with the contract of carriage."

In discussing the question as to whether under these sections the carrier could deliver the bulk shipments to the consignees named instead of to the persons to whom the packages were ultimately to be delivered, the Court uses this language:

> "There being nothing in the act prohibiting bulk shipments, and nothing requiring liquors to be always delivered to the owner or purchaser or consumer (as such), it seems to me that this record was perfect and that not only was the letter but the spirit of the legislation lived up to. * * *."

It will therefore be seen that this case, instead of sustaining the contention of the steamship Company, when rightly understood sustains the position of the Brewing Company. It clearly holds that under laws such as we are considering, the only duty resting upon a carrier is to deliver the shipments in carload lots to the consignee *in accordance with its contract of carriage,* and not to the individual owners or purchasers.

In conclusion we wish to say that the purpose of all provisions as to the manner in which shipments of intoxicating liquor may be made are to enable the authorities to properly trace and police them for the enforcement of the prohibition laws. Each one of the packages in question complied with all the requirements of the law and had on it the name of the Transfer Company and a permit bearing the name of the person for whom it was ultimately intended, so that delivery thereof to the Transfer Company would not in any way have affected or nullified the law in providing a way for tracing the shipments. Furthermore, the law expressly recognizes a Transfer Company as a transportation company of equal standing under the law with the railroad companies and delivery of these shipments to the Transfer Company was therefore expressly authorized by law. Delivery could have been made by the Transfer Company of the packages to the persons for whom they were intended, as well as

by the railroad company, and with the same effect to all intents and purposes so far as the public authorities and their ability to police and trace these shipments were concerned.

Why, therefore, should the steamship and rail carriers now be permitted to recover the exorbitant charges based upon a high minimum per package simply because they refused to recognize that the Transfer Company is entitled to receive the same consideration under the law as they do?

We submit that this case should be reversed and the action dismissed, as it was by the lower court in the first instance.

Respectfully submitted,

S. J. WETTRICK,
Attorney for Plaintiff in Error.

Seattle, Washington,
August 25, 1920.